No. 82-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, AND
MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents.

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF TRANS WORLD AIRLINES, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Air Transport Association of America ("ATA") as amicus curiae supports the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed in

the above entitled proceeding by Trans World Airlines ("TWA") on January 15, 1983. Counsel for Petitioner and Respondents have given their written consent for ATA to file briefs in support of the petition and on the merits should the writ be granted.

I. INTEREST OF THE AMICUS CURIAE, AIR TRANSPORT ASSOCIATION OF AMERICA

ATA is a non-profit, unincorporated association comprised of federally licensed airlines.[1/] Twenty-nine ATA

1/ The following airlines are members of ATA:

Air California, Air Canada, Air Florida, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Best Airlines, Inc. Braniff International, Capitol Air, Inc., Continental Airlines., Inc., CP Air, Delta Air Lines, Inc., Eastern Air Lines, Inc., Evergreen

(Footnote Continued on Next Page)

member airlines provide scheduled domestic air transportation. Fifteen of them provide scheduled foreign air transportation to some 72 foreign countries. Two of the Association's associate members, Air Canada and CP Air, are foreign air carriers engaged in international air transportation to many points in the world including 11 points in the United States. All of the ATA member airlines

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1/ (Continued from Previous Page)

International Airlines, Inc., Federal Express Corporation, The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Midway Airlines, Inc., Muse Air Corporation, Northwest Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Airlines, PSA -Pacific Southwest Airlines, Republic Airlines, Inc., Trans World Airlines, Inc., United Airlines, Inc., USAir, Inc., Western Airlines, Inc., Wien Air Alaska, Inc.

provide transportation of passengers or cargo which is subject to the terms of the Convention for the Unification of certain Rules Relating to International Transportation by Air (the Warsaw Convention"). 2/

ATA's activities are governed by its Articles of Association. Among the objectives and purposes of ATA set forth in those Articles are:

> To promote and develop the business of transporting goods and mail by aircraft between fixed termini, on regular schedules, and through special service, to the end that the best interests of the public and the members of the Association be served.
>
> To advocate the enactment of just and proper laws governing the airline business.

2/ Refusal of the United States Court of Appeals for the Second Circuit to apply a key Article of that Convention prospectively is the issue presented in this case.

> To improve the transportation service rendered by its members.
>
> To cooperate with all public officials in securing the proper enforcement of all laws affecting air transportation.
>
> In furtherance of these objects and purposes, to participate, in... proceedings before governmental agencies and courts.

In order to carry out these and other objectives and to fulfill its purposes, ATA, through its various offices and conferences, is involved in virtually all aspects of international aviation. Its representatives participate in meetings of international committees and diplomatic conferences concerned with the negotiation of treaties and international agreements affecting aviation, including those that govern the liability of airlines. ATA also participates in the development of: air carrier agreements and legislation

needed to implement treaties and execute agreements; international agreements relating to navigational and operating facilities for the purpose of promoting safety; route and traffic agreements and understandings with other nations; agreements for standardizing travel documents (cargo and passenger) and facilitating admission of passengers and cargo at ports of entry.

In performing these functions ATA representatives work closely with U. S. government officials of the Departments of State, Transportation and Treasury, representatives of the Federal Aviation Administration and the Civil Aeronautics Board and, from time to time, with other federal agencies to whose jurisdiction

various aspects of international air transportation are entrusted. In the case of the Warsaw Convention, ATA representatives have served as advisors to the United States delegations which have participated in a series of meetings of the Legal Committee (and Sub-Committee) of the International Civil Aviation Organization ("ICAO") which have addressed a number of proposals for updating this half-century old treaty -- most of them put forth by the Executive Branch of the United States Government.

In particular, the United States delegations to which ATA representatives have served as advisors, have devoted considerable effort and time in the past 17 years to reviewing and revising the liability provisions of the Warsaw Convention. At the Diplomatic Conference

held in Guatemala City, Guatemala, in 1971, the substantive provisions of the Warsaw Convention were comprehensively revised as to passengers. At the Diplomatic Conference in Montreal, Article 22 of the Convention was amended to replace the so-called Poincare franc with the Special Drawing Right ("SDR") of the International Monetary Fund ("IMF") as the unit of account for expressing the limitation on the level of damages that may be recovered in liability cases (passenger and cargo) subject to the Convention. That Conference also readopted the substantive provisions of the Guatemala Protocol 3/ which govern

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3/ The Guatemala City Protocol, reprinted in A. Lowenfeld, Aviation Law, Documents Supplement at 975-984 (2d ed. 1981)

the passenger regime (Montreal Protocol 3), modernized the documentation requirements of the cargo regime Montreal Protocol 4) and introduced strict liability principles while leaving the liability level of the latter regime unchanged. 4/

ATA's involvement in these proceedings evidences its deep interest in the international aspects of air transportation, and gives it a perspective going beyond the narrow question of what the recovery of the Franklin Mint should be in the case at hand. ATA is concerned about the impact that the refusal of the Second Circuit to apply Article 22 of the Convention

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4/ Montreal Protocols No. 3 and No. 4 (1975), reprinted in A. Lowenfeld, Aviation Law, Documents Supplement at 985-1001 (2d ed. 1981).

and its limitation on cargo damages in future cases will have on all of its air carrier members, including those who were not before the court in the Franklin Mint case. It is equally concerned with the future of the Convention itself -- whether or not any of the Convention's articles or regimes can survive a refusal by the courts of the world's most important aviation nation to apply one of the Convention's most critical Articles. 5/ Finally, is concerned about the impact that abrogation of a key provision of Warsaw by

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5/ See Lowenfeld and Mendelsohn, THE UNITED STATES AND THE WARSAW CONVENTION, 80 Harv. L.R., p. 135; and Boyle, THE GUATEMALA PROTOCOL TO THE WARSAW CONVENTION, 6 Calif. Western International L.J., p. 41. (Hereinafter the Lowenfeld and Mendelsohn article will be cited as "Lowenfeld and Mendelsohn" and the Boyle Article as "Boyle.")

the Judicial Branch of the U. S. Government would have on other international agreements and conventions critical to the safe and orderly future development of international civil aviation.
aviation. 6/

II. ARGUMENT

A. THE WARSAW CONVENTION TO WHICH THE UNITED STATES ADHERED AND PLEDGED SUPPORT IN 1934, IS A COMPREHENSIVE TREATY WHICH PRESCRIBES RULES OF INTERNATIONAL CARRIAGE BY AIR AND ESTABLISHES A LIABILITY REGIME FOR CARGO AND PASSENGERS.

The Warsaw Convention is a treaty comprised of a number of interdependent provisions. Insofar as it pertains to cargo, the subject matter involved in the instant case, it establishes uniform

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6/ See Preamble, Convention on International Civil Aviation, (opened for signature, Dec. 7, 1944) 61 Stat. 1180. T.I.A.S. No. 1591, 1591, 15 U.N.T.S. 295.

documentation requirements which protect both shippers and airlines from a plethora of local requirements around the world. In the absence of these provisions, both shippers and airlines would be uncertain as to whether the documents reflecting their commercial transactions would run afoul of one or more of those local requirements. 7/ Articles 3 and 11 were adopted to avoid such a possibility. In addition to providing the protections just mentioned the articles dealing with documentation have permitted the development of airline agreements which make it possible to ship cargo anywhere in the world on a single air waybill.

7/ See C. Shawcross and K. Beaumont, AIR LAW, Sec. 40, n(e), p. 71 (2d ed., 1951).

With a few exceptions, the Convention makes carriers liable for loss, damage, destruction or delay of cargo by creating a rebuttable presumption (Article 18), and specifies the jurisdictions within which claims may be prosecuted (Article 28). These provisions are also regarded by many of the participating nations as extremely important because they limit significantly the maze of conflicting legal theories of liability and conflicts of laws problems that otherwise would have to be dealt with on an ad hoc basis by courts of nations with different legal systems.

As a complement to the foregoing cargo regime, the passenger regime also establishes a rebuttable presumption of carrier liability (Articles 17 and 19),

sets forth ticketing and baggage check requirements that must be met (Articles 3 and 4), sets uniform limits of carrier liability except under very limited circumstances (Articles 22 and 25), and designates jurisdictions within which claims may be brought (Article 28).

In order to assure that the treaty is kept intact as a whole instrument comprised of interdependent provisions, the Convention's reservation clause is very restrictive, authorizing a reservation by a sovereign party only in the case of "international transportation by air performed directly by the state." 8/

8/ See Additional Protocol With Reference to Article 2. 49 Stat. 3025.

This reservation clause is also looked to by most of the participating nations as a guarantee that none of the participants will attempt to abrogate the limitations on libility.

B. THE UNITED STATES GOVERNMENT HAS PLAYED A MAJOR ROLE IN REFINING THE CONVENTION SINCE BECOMING AN ADHERENT AND HAS BEEN THE DOMINANT FORCE BEHIND EFFORTS TO MAKE MODERNIZING REVISIONS. BY DOING SO IT HAS FURTHER STRENGTHENED THE WORLD WIDE UNDERSTANDING THAT THE UNITED STATES WILL CONTINUE TO OBSERVE ALL ELEMENTS OF THE CONVENTION, INCLUDING THE ARTICLE 22 LIMITATION OF LIABILITY.

The United States was not a prime mover in fashioning the Warsaw Convention. However, it did play a significant role in formulating the

Hague Protocol. 9/ The United States did not ratify that Protocol because the Executive Branch believed that further changes in the passenger regime were needed to provide greater benefits for claimants and to bring the Protocol more in line with American standards insofar as the limitation of liability in passenger cases was concerned. 10/ Since the limits applicable in cargo cases were in reasonable accord with the domestic experience, the chief emphasis

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9/ See Protocol to Amend the Conventio for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at the Hague, Sept. 28, 1955, 478 U.N.T.S. 371. Calkins, HIKING THE LIMITS OF LIABILITY AT THE HAGUE, PROCEEDINGS OF THE AM. SOC'Y OF INT'L L. 120, 124 (1962); Lowenfeld and Mendelsohn, p. 532; and Boyle p. 42.

10/ Lowenfeld and Mendelsohn, p. 533, 552.

of the United States has been on streamlining the documentation requirements of that regime and introducing the concept of strict liability to transportation treaty law.

With these objectives in mind, for the past 17 years, the United States Executive Branch has driven a hard bargain with its treaty partners in updating the Convention along lines favorable to the United States and its citizens. As a part of this effort, the United States, under President Johnson, served notice of denunciation of the Convention because of dissatisfaction with the low limitation of liability in passenger cases, and as a tactic for achieving its goals. 11/ However, in

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11/ Lowenfeld and Mendelsohn, p. 497.

taking that step, the United States stated that the notice of denunciation would be rescinded if there were a "reasonable prospect" of an international accord increasing the passenger limit to a level "in the area of $100,000"; and if a provisional arrangement among the principal international airlines flying to and from the United States, waiving the passenger limit up to US$75,000 and waiving the carriers' right to rebut the presumption of liability, could be achieved. 12/ When, in accordance with Article 22(1) an interim airline

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12/ 50 DEPT. STATE BULL. 923,24 (1965); 54 DEPT STATE BULL. 580 (1966); and 2 Montreal Proceedings 174-78.

agreement [13/] ("Montreal Agreement") was reached, waiving the limit up to US$75,000 and the carrier defenses set forth in Article 20(1), the United States withdrew its denunciation and began the lengthy process of negotiating revisions to the Convention along the lines mentioned above. This was undertaken within the framework of ICAO and meetings of appropriate ICAO committees, which are comprised of a cross section of the nations of the international aviation community.

Among other things, the changes in the passenger regime sought by the

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13/ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol. This Agreement, CAB 18900, was approved by the Civil Aeronautics Board on May 13, 1966. 44 CAB Rept 819 (1966) See Boyle, pp 45-49.

United States as a result of these negotiations included: making carriers liable without regard to fault; increasing the limitation on recoverable damages from US$6,300 to US$100,000; adding a provision to induce settlements of claims subject to the Convention; revising the jurisdiction article virtually to assure all American claimmants that an action could be brought before an American court; and recognizing the right of each party to the Convention to supplement recoveries within its own territory. 14/

These proposed changes were strongly resisted within the international community, and there were many charges of insensitivity on the

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14 / See Boyle, pp.49-56.

part of the United States to the plight of less fortunate nations. For the most part, these objections came from smaller, less developed nations. There were, however, objections raised by some of the fully developed nations whose social systems depend less upon litigation as a means of providing for surviving dependents or making recompense to injured parties, than is the case in the United States. 15/

Throughout these negotiations, the United States held out the threat of denunciation if other nations did not go

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15/ Questions were raised by such diverse delegations as those of Sweden and Switzerland on the one hand and Nigeria on the other. I Montreal Proceedings 925, 28. The Nigerian delegate raised the rhetorical question "why should the peasant pay for the comfort of the king?" Id. at 9.

along with its objectives, most particularly the proposed increases in potential recoveries. Objectionable as the increases were to some of the parties, the prospect of no limit at all in the case of flights to and from the United States was even worse in their eyes. Thus, with very few compromises, the United States prevailed and a protocol embracing nearly all of of its objectives in the case of the passenger regime was opened for signature and signed by the United States at Guatemala City in 1971. That Protocol was known as the Guatemala Protocol but, as noted above, has been subsumed by Montreal Protocol 3.

All of the negotiations and discussions regarding the increased level of the limits were conducted in terms of United States dollars, and the

dollar amount was converted into Poincare francs when treaty language was drafted. This was done in order to leave the unit of account established by the original Convention undisturbed, primarily because of its historic usage and the longstanding commitment to a "gold clause" by some parties to the treaty.

The United States later took the leading role in triggering a change in the unit of account from the Poincare franc to the SDR, at the Montreal Conference of 1975. This action, reflected in both Montreal Protocols 3 and 4, was taken in anticipation of

action by the international community demonetizing gold. 16/

There was no doubt throughout the negotiations described above that the United States was the driving force behind the revisions to the Convention embodied in the Montreal Protocols which are now pending before the United States Senate. Nor is there any question that other nations went along in the face of threatened withdrawal of the United States from the Convention. They went along to assure that there would be a limit.

16/ In the United States, gold was demonitized by repeal of the Par Value Modification Act. See Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act, 31 U.S.C. repealed by Pub. L. No. 94-564, Stat. 2660.

C. THE CONVENTION ESTABLISHES A LIMITATION ON RECOVERABLE DAMAGES IN THE CASE OF CARGO AND PASSENGERS. THE PARTIES TO THE CONVENTION INTENDED TO HAVE SUCH A LIMIT AS FURTHER ATTESTED BY THE FACT THAT ALL PROTOCOLS TO THE CONVENTION AND THE INTERIM MONTREAL AGREEMENT HAVE INCLUDED SUCH A PROVISION, THUS UNDERSCORING THE INTENT OF THE PARTIES TO MAINTAIN SUCH A LIMIT. THE COURTS MUST CONSTRUE TREATIES LIBERALLY TO HONOR THIS INTENT.

The plain words of Article 22 of the Warsaw Convention make it clear that the Convention limits recovery. The intent to do so is equally clear. It is the function of courts in interpreting treaties to determine that intent and to respect it -- to "strive to construct their words to give them a meaning consistent with ... genuine shared expectations." Eck v. United Arab Airlines, Inc, 360 F.2d 804, 812 (2nd Cir. 1966) and Day v. Trans World

Airlines, Inc., 528 F.2d 31, 35 (2d Cir. 1975).

Courts are also required to construe treaties liberally to effectuate the intent of the parties. In Nielsen v. Johnson, 279 U.S. 47 (1929) this court held that a treaty between the United States and Denmark prevented the State of Iowa from imposing an inheritance tax on a nonresident alien who was heir to the estate of a resident alien of Iowa. The following observations concerning the principles of treaty construction are instructive:

> "The narrow and restricted interpretation of the treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which

> are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties...."
>
> * * *
>
> "When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it." 279 U.S. 51, 52. (Underscoring added; Court's citations omitted.)

It is respectfully submitted that the court below made no effort to follow this principle in its disposition of the claim of Franklin Mint.

A mere recitation of the reactions of other parties to U.S. efforts leading to negotiation of the Montreal Protocols leaves no room for doubting that the parties to the Convention, including the United States Government, intended Article 22 to limit recoveries

in the case of cargo and passengers -- and expect that it will continue to do so. But if doubt persists, it should be dispelled by the consistent course of action by the parties to Warsaw subsequent to adopting the original Convention. "The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions." Day v. TWA, 528 F.2d at 35. See Pigeon River Improvement Slide and Boom Co. v. Charles W. Cox, Ltd., Cox, 291, U.S. 138, 558-63 (1934).

That consistent course of action began with negotiation of the Hague Protocol of 1955 which doubled the limit in the case of passengers -- but retained a limit. The Monteal Agreement

insisted upon by the United States retains a limit ($US75,000). At no time during the proceedings at Guatemala City was there any suggestion of abolishing the limit. Indeed, in the case of the passenger regime, the new Protocol made it clear that the limit may not be exceeded under the limited circumstances permitted by the original Convention. 17/

Further testimony to the resolute intent of the parties to the Convention to limit recoveries is the action changing the unit of account, taken at the 1975 Montreal Diplomatic Conference -- again at the behest of the United

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17/ ICAO Doc. 9040-LC/167-1 (Sept.21, 1973). See Boyle, pp.54, 66 and 67; and Lowenfeld and Mendelsohn, p. 557.

States [18/] . This action reflects a preference for the SDR as an easily convertible unit of account for the long term. [19/] It again reflects an intent to retain a limit. Cf. Franklin Mint v. TWA, 690 F.2d 308, 311.

18/ The role played by the United States in bringing about the Montreal Conference and pushing for the change of the unit of account is described in the Report of the U.S. Delegation:

> "The U. S. initially drew attention to the SDR as a possible replacement for the Poincare franc in cables circulated to various foreign capitals, and thereafter recommended a proposal in an Appendix to the Report of the Special Working Group held in Montreal in April 1975 in

(Footnote continued on next page)

19/ Moreover, it demonstrates that the parties wanted to take no chance (Footnote Continued on Next Page) that the franc would be converted on the basis of the free market value of gold since doing so would preclude any semblance of stability.

Having been the moving force behind virtually all of the revisions that Montreal Protocols 3 and 4 would make in the Convention, including the change to

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preparation for the Montreal Diplomatic Conference. As a result of the U. S. efforts and discussions at a meeting of the European Civil Aviation Conference in June, 1975, Norway introduced a formal proposal for adoption of appropriate protocols substituting the SDR for the Poincare franc in the Convention and for an appropriate amendment to the Conference agenda to permit discussion of the subject. The advance circulation of these materials and the general familiarity with the problem in the Finance Ministries of all countries parties to the IMF resulted in overwhelming support for adoption of the SDR. The only opposition was from East European countries which have not joined the IMF." Detailed Report of the U. S. Delegation on International Conference on Air Law held under the auspices of the International Civil Aviation Organization, Montreal, September, 1975, p. 17.

the SDR as the unit of account, and a signatory to those Protocols at the Montreal Diplomatic Conference, it seems axiomatic that the U.S. should take no steps through any branch of its government that would signal abandonment of the underlying Convention. And, of course, the Executive Branch, upon which the conduct of foreign policy devolves, has not taken such steps. Nor has the legislative branch, which has yet to act on the Executive's request for advice and consent to ratification of the Protocols. Yet the decision in Franklin Mint, if it is allowed to stand, would do just that.

In this connection, the Vienna Convention on the Law of Treaties [8 I.L.M. 679, 686 (1969)] includes an Article, Article 18, specifically

requiring states which have signed a treaty to "refrain from acts which would defeat the object and purpose of [that] treaty. . . ." Ibid. The United States has not ratified the Vienna Convention; however, as Secretary of State Rogers wrote President Nixon in urging its transmittal to the Senate, "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law practice." S.Exec. Doc.L.92d Cong., 1st Sess. The Secretary's observation is corroborated by many federal court decisions referring to other aspects of the Vienna Convention. See, e.g., Weinberger v. Rossi ,50 U.S.L.W. 4354, 4355 n.5 (U.S. March 31, 1982), reversed and remanded 642 F.2d 553 (D.C. Cir.1980); Greater Tampa Chamber

of Commerce v. Goldschmidt, 627 F.2d 258, 263 n.4 (D.C.Cir.1980); and Husserl v. Swiss Air Transport Co., 351 F.Supp.702, 707 (s.D.N.Y. 1972), aff'd per curiam, 485 F.2d 1240(2d Cir.1973.

In the case at hand, the United States has signed (but not yet ratified) the Montreal Protocols. If the decision of the court below stands, the United States will have taken an action which defeats a fundamental object and purpose of those Protocols -- maintenance of a limit of liability in international air transportation.

D. REPEAL OF THE PAR VALUE MODIFICATION ACT DOES NOT ABROGATE ANY ARTICLE OF THE WARSAW CONVENTION AND DOES NOT MEAN THAT DAMAGES EXPRESSED IN POINCARE FRANCS CANNOT BE CONVERTED INTO LOCAL CURRENCIES WITHOUT JUDICIAL INVOLVEMENT IN TREATY MAKING.

The decision of the Second Circuit holding Article 22 of the Convention unenforceable seems grounded almost exclusively on the action of Congress repealing the Par Value Modification Act, thus abolishing the official price of gold in the United States. Although the court's opinion acknowledges that "Congress may not have focused explicitly upon the Convention in repealing that Act. . . ."(Franklin Mint v. TWA. 690 F.2d 303, 309), it goes on to conclude that the purpose of repealing the Act "plainly encompasses [abrogation of the] use of that price to convert judgments into United States currency values." Ibid.

In order to sustain the action of the court below in refusing to apply the limits, this Court must conclude either:

(a) that Congress itself has abrogated a critical provision of the Convention sub silentio, which this Court's decision in United States v. Lee Yen Tai [20/] 185 U.S. 213, 221-22 (1902) counsels is not permissible; or (b) that the Court below was itself justified in ignoring the Convention limits because of its conclusion that Congress believed

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20/ In Lee Yen Tai this Court said: "Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly irom the words used in the statute or in the treaty." 185 U.S. 222. (Underscoring added). See Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 16 (1934); Menominee Tribe of Indians v. United States, 391 412-13 (1968); Washington v. Washington State Commercial-Passenger Fishing Vessel Assoc. 443 U.S. 658, 690 (1979).

the official price of gold "was out of touch with economic reality" (690 F.2d 309, 311), an incursion into the prerogatives of the Executive and Legislative Branches of Government proscribed by the Separation of Powers doctrine. This Court in Clark v. Braden, supra , recognized this constitutional prohibition, stating:

> "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. 57 U.S. (116 How.) 635."

It is true that circumstances have changed in recent years regarding the role of gold as a unit of account, but that does not relieve any nation which is a party to the treaty of the obligation to observe the limits set in

the Convention. The repeal of the Par Value Modification Act does not mean that there is no way in which Poincare francs can be converted into local currencies.

We shall not belabor the argument lucidly made by TWA, in justifying the use of the last official value of gold or the SDR as a basis for converting the existing unit of account into dollars. 21 / We would emphasize, however, in support of using the last official value as the basis for conversion, that the Civil Aeronautics Board, an instrument of the U.S. Government, ordered all airlines to file tariffs making the conversion on that basis (CAB Order 74-1-16, dated January 3, 1974). Those

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21 See TWA Petition for a Writ of Certiorari, pp. 15-18 (last official value) and pp. 18-22 (SDR's).

mandated tariffs, such as the underlying TWA tariff in the instant case, are fully consistent with the Convention and the resolute intent of the parties to the Convention. As such consistent reflections of a prevailing treaty, they are binding on international air shippers. 22 /

Regarding the use of SDR's, we respectfully submit that TWA's explanation of how the necessary computations needed to make the conversion on that basis is to the point and persuasive. As TWA pointed out,

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22 Adams Express Co. v. Croninger, 226 U.S.491 (1913); Boston & Maine R.R. v. Hooker, 233 U.S.97 (1914); Herman v. Northwest Airlines, Inc., 222 F.2d 326 (2d Cir.), cert. denied, 350 U.S. 843 (1955); Vogelsang v. Delta Air Lines, Inc. 302 F.2d 709 (2d Cir. 1962); and Tishman & Lipp, Inc. v. Delta Air Lines, Inc., 413 F.2d 1401 (2d Cir. 1969).

this can be accomplished without involving the Court in treaty making -- without the court's having to determine what the limits should be.

In this connection, it is noteworthy that the courts of other signatory parties to the Convention, mindful of their commitments under the treaty, have not found the task insurmountable. 23 / Nor, for that matter, have other courts in the United States. 24/

23/ Courts in the Netherlands and Italy have made the conversion on the basis of SDRs. basis of SDRs. State of the Netherlands v. Giant Shipping Corp., Rechtspraak van De Week, 301, (Supreme Court of the Netherlands, May 1, 1981); Linee Aerea Italiane v. Riccioli (Rome Civil Court Judgment 609/1979, Nov. 14, 1978).

24/ The following decisions by U. S. District Courts have used the last official value of gold as the basis

(Footnote Continued on Next Page)

Should this Court decline to review the case at hand, the Convention limits will have been abrogated insofar as future cargo cases brought within the Second Circuit are concerned. And surely that refusal will be urged by litigants as dispositive of the issues involved in the Fifth Circuit where an

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for converting the Poincare franc into U.S. dollars: Franklin Mint, Corp., v. Trans World Airlines, Inc., 525 F. Supp. 1288 (S.D.N.Y. 1981); In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833 (E.D.N.Y. 1982); Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc. Index No. 784512 (Cal. Super.Ct., San Fr., Deutsche Luftnansa AG, Index No. 81 N.D.Ill.1982. Cf. Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 531 F. Supp. 344 (S.D. Tex. 1981,) appeal docketed, No. 81-2519 (5th Cir. Dec. 24, 1981) using the free market value as the basis for conversion.

appeal of a District Court decision converting on the basis of the free market value is pending, and in the Seventh Circuit, should the decision of the U.S. District Court for the Northern District of Illinois using the last official value of gold be appealed. The latter case was decided by that District Court subsequent to the decision in Franklin Mint, and explicitly considered and rejected the Franklin Mint reasoning.

E. IF THE DECISION BELOW REFUSING TO APPLY A CRITICAL ARTICLE OF THE CONVENTION IS UPHELD, THE UNITED STATES WILL HAVE FAILED TO HONOR ITS COMMITMENT TO OTHER NATIONS AND MAY HAVE SERIOUSLY JEOPARDIZED A WIDELY SUBSCRIBED AND BENEFICIAL TREATY AS WELL AS ITS OWN LEADERSHIP ROLE IN INTERNATIONAL AVIATION. IF THOSE RISKS ARE TO BE TAKEN ON OTHER THAN CONSTITUTIONAL GROUNDS, THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT MUST MAKE THAT DECISION.

Respect for this nation's international commitments is part of the American heritage. Few of its citizens are indulgent of foreign nations perceived to take their international commitments lightly -- to regard treaties and other agreements as proverbial scraps of paper or to "split legal hairs" to avoid their commitments.

Not only can disregard of international agreements impact adversely on private citizens of the nations which are parties to such agreements, it can weigh heavily upon the standing in the world community of a nation that does so. These observations, applicable to actions taken by other branches of the United States Government, apply with special

force to the Judicial Branch where treaties are involved. Whether to ratify or denounce a treaty is a political decision which is not suited for judicial determination. 25 / For this reason, Article 2 of Section 2, Clause 2 of the Constitution leaves the treaty making power to the Executive Branch of government with the advice and consent of the Senate.

As previously set forth, the United States played no role in developing the original Convention. However, its

25/ This Court has recognized "...that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the Executive and Legislative Departments of our government; and that they belong to diplomacy and legislation, and not to the administration of laws...." Whitney v. Robertson , 124 U.S. 190 (1888). See Taylor v. Morton , 2 Curtis 454,459, relied upon in Whitney .

instrument of adherence in 1934 pledged to observe that Convention in good faith. These words from the Proclamation of Adherence are worthy of note:

> "Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention and additional protocol to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof, subject to the reservation 26/ aforesaid." Proclamation of President Franklin D. Roosevelt declaring U.S. adherence to the Warsaw Convention. 49 Stat. 3000, T.S. 876 (1934); (underscoring additional)

26/ The reservation referred to in the proclamation of adherence is that the Convention will not apply to international transportation performed by the Unites States government. If the action of the court below is viewed as a reservation it is faulty on two scores: the court is not empowered to make such a reservation and, even if it were, the reservation is not permitted.

If Franklin Mint is followed and becomes the law of the land, there is a good chance that many parties to the Convention, some of whom have expressed impatience with the pace of the ratification of the Montreal Protocols by their principal author,-- the United States, might regard the decision as having the same practical effect of as withdrawal from the entire Convention by the United States. To many of them an enforceable Article 22 is the sine quo no to their own participation and it is doubtful that they would take much comfort in the fact that the decision is by its terms limited to the disposition of future cargo claims.

Again, provisions of the Vienna Convention on the Law of Treaties (8 I.L.M.679) are instructive. Article

60(2) provides that "a material breach of a multilateral treaty by one of the parties" entitles: a) the other parties collectively to suspend operation of the treaty or terminate it vis a vis the defaulting State or between all parties, or (b) an individual party to suspend the treaty's operation vis a vis the defaulting state or every party. Article 60(3) defines "the violation of a provision essential to the accomplishment of the object or purpose of the treaty" as a material breach. Article 22 of Warsaw, establishing the limits on liability, is just such a provision. Some of the participating nations whose airlines are owned and operated by the government may well be tempted to return to the extremely low limits imposed by their own local laws

-- limits which may be adequate to cover most of their own citizens, but far less than the level believed essential for American passengers and shippers by the U.S. Government. In short, since the Convention, as interpreted in Franklin Mint ,would not fulfill their expectations of limiting liability in American courts, some nations would have little reason to continue to abide by the Convention.

Of course, no one can be sure that there will be immediate and massive withdrawals from, or suspensions of the Convention if Franklin Mint is allowed to stand. But, as previously suggested, there is at least a fair prospect that support for the Convention will erode if Article 22 is not enforceable in the

courts of the most important aviation country.

If suspensions and terminations were to result, fewer cases could be brought in American courts. This would be a significant loss for American travelers and shippers whose claims are against connecting airlines, or other airlines which do not fly to the United States. In such cases, American citizens would face the possibility of having to bring their claims in a faraway, foreign court or of having their recoveries severely limited by foreign law even if they succeed in establishing jurisdiction in an American court. 27/

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27 A good example is Tramontana v. Varig, 350 F.2d 468 (D.C. Cir. 1965), a non-Warsaw case, where

(Footnote Continued on Next Page)

American flag carriers would also be subject to the vicissitudes and uncertainties of foreign law in more instances than is presently the case. In short, travelers, shippers and the nation's flag carriers would have to cope with a maze of widely differing legal systems and philosophies of recompense, if the Convention ceases to be a viable treaty.

The Executive and Legislative Branches of the U.S. Government have recognized the importance to American citizens and American flag airlines, of guarding against these contingencies. This is manifested by U.S. adherence to

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under Brazilian law the recovery of the surviving wife of a member of the United States Navy Band was limited to $170, even though the case was tried in the federal court in Washington, D.C.

the Convention and the U.S. leadership role in updating the Convention through the Montreal Protocols. The court below while eschewing the idea of engaging in treaty making, did just that when it declared Article 22 prospectively unenforceable in American Courts in the case of cargo claims. In doing so, it has placed in jeopardy the objectives of the Executive branch of our Government.

Apart from the potential impact on air carriers and the customers who use their services, the credibility of the United States as a leader in the international aviation world will inevitably suffer if the Convention is not enforced by American courts. It was the United States which drove a hard bargain to secure the acceptance of changes in the Convention primarily for

the benefit of its own citizens. In making concessions, sometimes painful ones, to the United States in order to preserve the Convention, this country's negotiating partners throughout the preparatory meetings at ICAO and at the Guatemala and Montreal Conferences were led to believe that the United States would stand by Article 22 which imposes limits on the damages that might be recovered. The Franklin Mint decision casts doubt upon that commitment. Any nation believed by its treaty partners to have disregarded its treaty obligations, for whatever reason, will surely place its future credibility at risk, and may well have mortgaged its leadership role in developing other critical international agreements.

III. CONCLUSION

The decision of the court below refusing to enforce a critical provision of the world's most widely subscribed private law treaty is tantamount to an abrogation of Article 22 of that treaty, or a prohibited reservation to that treaty. Such action is in contravention of the separation of powers contemplated by the U.S. Constitution; is at odds with the principles of treaty construction as enunciated by decisions of this Court; and will frustrate the long-standing objective of the Executive Branch of the U.S. Government to update the Convention.

The action of the court below should not be permitted to stand without review by this Court. Accordingly, TWA's Petition for a Writ of Certiorari should be granted.

IV. SUMMARY OF ARGUMENT

The Warsaw Convention prescribes rules governing international carriage by air, including related documentation. The treaty also establishes uniform rules of liability; specifies jurisdictions in which actions may be brought against air carriers; and places uniform limitations on recoveries.

The United States adhered to the Convention in 1934 and pledged to observe "every article and clause" of it with a single reservation not relevant in the instant case.

Since it became an adherent, the United States has been actively engaged in efforts to modernize the treaty. Although the United States has pushed for significantly higher limits in the

case of passengers, and has secured the consent of most of its treaty partners to such an increase, it has continued to support Article 22 which imposes limitations in the case of both passenger and cargo claims.

It is not a judicial prerogative to abrogate a treaty on nonconstitutional grounds. Clark v. Braden , 57 US (116 How.) 635. Rather it is the duty of American courts, as enunciated by this Court in Nielsen v. Johnson 279 U.S. 41, to interpret treaties liberally "so as to effect the apparent intention of the parties." The intention of the parties may be gleaned from their deliberations in negotiating treaties, and from their actions subsequent to adoption of a treaty.

It is clear from the consistent course of action by the parties to the Warsaw Convention since its adoption that they intend to retain the limitations imposed by Article 22. The Hague Protocol of 1955 retained the limitation provisions, as did the interim airline arrangement adopted at the insistence of the U.S. Government, the Montreal Agreement of 1966. The Guatemala Protocol, opened for signature in 1971, contains a limitation on recoveries in the case of passengers; and Montreal Protocols 3 and 4, adopted in 1975, continue to specify limits in the case of both passengers and cargo. The action of the Montreal Conference in replacing the Poincare franc with the

SDR was taken to protect the integrity of the limits imposed by Article 22. Finally, the transmittal of the Montreal Protocols to the Senate for its advice and consent reveals the intent of the Executive Branch of the American Government to retain a limitation.

The court below erred in concluding that Congress by abolishing the official price of gold has rendered the treaty unenforceable. Such a conclusion is not permissible under decisions of this Court holding that abrogation of a treaty provision by Congress "must appear clearly and distinctly from the words used in the statute or in the treaty." U.S. v. Lee Yen Tai, 185 U.S . 221-22.

In repealing the Par Value Modification Act, thus abolishing the official price of gold, Congress made no mention of the Convention and, as the Court below acknowledged, "may not have focused explicitly on the Convention." Franklin Mint v. TWA , 690 F.2d 303, 309, 311.

The court below erred in concluding that it could not convert the Poincare franc into dollars without engaging in treaty making. There is a sound basis for using either the last official price of gold, as embodied in airline tariffs mandated by the Civil Aeronautics Board, or the SDR, which was substituted for the Poincare franc in the Montreal Protocols at the behest of the U.S. government.

If Article 22 is not enforced in American courts the United States may well be perceived as having dishonored its pledge to observe the treaty, and as having misled other nations who reluctanty agreed to higher limits in developing amendments to the treaty, in the belief that it would assure retention of the limits. Since many nations regard Article 22 as the sine qua non of their participation, the decision of the court below might well lead to an erosion of the Convention to the detriment of American passengers and shippers, as well as its flag carriers.

The perception of the United States as an unreliable treaty partner could also prejudice the leadership role of the United States, vital to other important international aviation agreements.

If these risks are to be taken, the Executive and Legislative Branches of Government, and not the Judicial Branch, should make that decision.

Respectfully submitted,

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